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## Technical Bulletins: The Telecommunications Act of 1996 and its Impact on Tennessee Cities

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*Municipal Technical Advisory Service*

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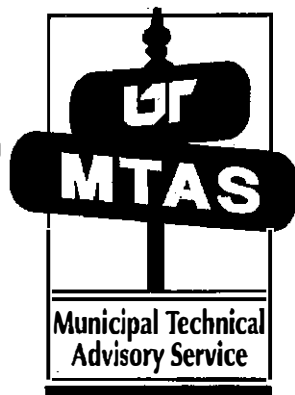
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*A University of Tennessee*

# Technical Bulletin

December 1996

## The Telecommunications Act of 1996 and its Impact on Tennessee Cities

*By Jim Finane, MTAS Special Projects Consultant*

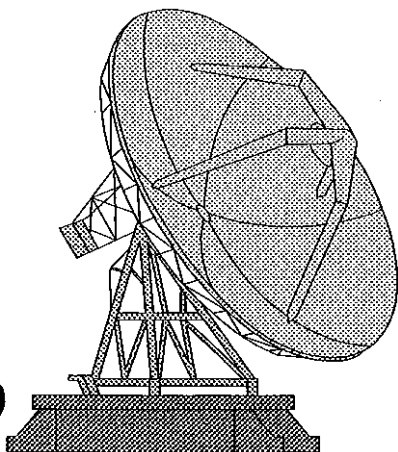
The Telecommunications Act of 1996, passed by Congress and signed by the president in February, is a major rewrite of the country's basic telecommunications law. It was drafted and passed in response to a rapidly changing telecommunications environment where traditional local and long-distance telephone service, wireless telephones, and cable and broadcast television are all "converging." All of these companies are using the same technologies, competing for the same customers, and even providing identical service choices.

The Telecommunications Act of 1996, along with the growing series of Federal Communications Commission (FCC) rules, will radically alter and facilitate the expansion

of the telecommunications business in response to this convergence.

The role of local governments in franchising and regulating telecommunications providers is also changing in this new environment. Instead of occasionally working with a single cable operator with a long-term franchise, your city may have to face:

- ① local telephone companies like BellSouth providing long-distance service, cable service, and movies-on-demand;
- ① cable companies like Time-Warner getting into local telephone service;
- ① long-distance companies such as AT&T, MCI, and Sprint competing with BellSouth for local telephone service;
- ① an explosion of small, closely spaced cellular towers that will provide Personal Communications Service (PCS) wireless phone service, provided by all of these companies and some brand new ones, that could become price-competitive with standard phone service; and
- ① an increase in the number of satellite dishes in every part of your city.

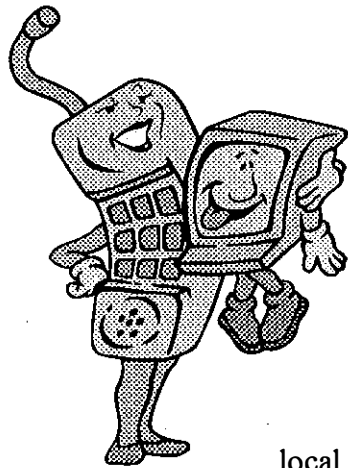


This is not science fiction or some possible distant-future vision. These very events are already occurring in Memphis, Nashville, Knoxville, and Chattanooga, and may already be affecting many other cities in Tennessee.

The purpose of this technical bulletin is to describe what the basic ground rules are for local government, as far as they are known at this point, and to suggest to Tennessee towns and cities some strategies for exercising their rights under the new law.

### **About the Telecommunications Act of 1996**

While there has been a lot of press about the new act and what it does, its most important feature is that it increases competition in all types of telecommunications. There are provisions that allow virtually every telecommunications enterprise to compete with any other such business, whether that is



local or long-distance telephone, cable TV, or wireless communications. Unfortunately, the first noticeable effect of the act may be short-term increases in cable rates over the next two to three years. There has been much activity in mergers and acquisitions in the cable business, both in Tennessee and nationwide, and the new act will essentially deregulate the most expensive part of cable service by March 1999. This suggests that price increases are inevitable. The promise of deregulation is that there will be new competition for cable customers. In Tennessee, that competition will occur immediately in and around the "Big Four" cities.

The act encourages competition for local telephone service by the act by attempting to

set up a regulatory system that prices the cost of "universal service" separately from other, more competitive service and forces all local service providers to share in the cost of that service. In Tennessee, that means that BellSouth and a few smaller companies will be able to price their business services separately from their universal service customers and receive compensation from their competitors to pay for part of their universal service costs. In the case of businesses and city governments, there are likely to be a number of companies offering various local and long-distance packages that could save you money when compared to your present telephone service.

Local governments will still have a role with the telecommunications providers within their boundaries. For the first time in a federal law, the area of local government activity in telecommunications is defined. Since the basic tenet of the act is free and unfettered competition within reason among telecommunications providers, there is strong language in the act that pre-empts all state and local laws that pose "barriers to entry" into any telecommunications service by any provider.

However, there are two exceptions:

1. Laws that promote universal service, public safety, and consumer protection; and
2. Laws that allow states and local governments to manage local rights of way and to charge nondiscriminatory fees for the use of those rights of way.

These two exceptions, in addition to the parts of the 1992 Cable Act that are still in effect, define the activity allowed to local governments in regulating telecommunications. The exception for right of way control and related fees looks straightforward. However, if local governments want to retain control of their rights of way, any dispute with the

telecommunications companies over right of way use will now be settled in the General Assembly in Nashville—and not in Washington D.C.

*The following sections provide more detail on the rules of the 1996 act that will be used with cable operators, local phone companies, owners of wireless towers, and satellite dish users, as well as some suggestions on what your city or town should do to cope with these changes.*

### Cable Operators

Your existing franchised cable operator will be able to operate with fewer restrictions than under the previous Cable Act of 1992. The standard for notifying customers of rate changes is more flexible, but notification is still required. The rules for what systems can be rate-regulated is also relaxed. In franchise areas serving less than 50,000 subscribers served by a company with less than 1 percent of all subscribers nationwide, rates are deregulated by the 1996 act. This particular provision will have very little impact in Tennessee because few cities in Tennessee chose to regulate rates under the 1992 Cable Act. And of those that have chosen to do so, most are served by large national companies with more than 1 percent of the nation's customers.

Any rate regulation of “expanded basic,” or whatever your cable operator calls its service beyond the minimum basic tier, will end nationwide in March 1999. Local governments may regulate only the “basic” service and not the “expanded basic” service. Since the 1992 Cable Act, regulation of “expanded basic” has been the responsibility of the FCC due to complaints from subscribers or local governments. While this may not affect many systems in Tennessee directly, we will not be immune from the likely overall rate increases

that will both precede and follow this deregulation, especially in areas without cable-service competition. The definition of a “cable system” also changed with the 1996 act. The definition now defines a cable system subject to franchising as a system that crosses public rights of way. This would exempt any system from franchising and local regulation that used only private property to connect, for example, a group of apartment buildings or a row of hotels, regardless of ownership.

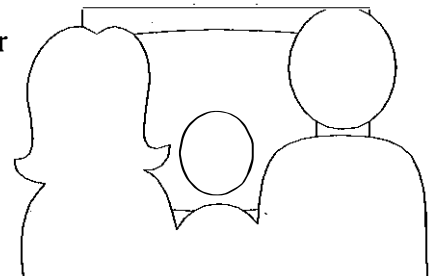
The 1996 act also allows cable operators to provide other telecommunications services over their cable system. Your city can require franchise fees for this use of your rights of way, but you **cannot** do it through the existing cable franchise. Specifically:

You **can't** require a cable company to get a cable franchise before providing phone service.

You **can** require the cable company to get a separate telecommunications franchise to provide phone service.

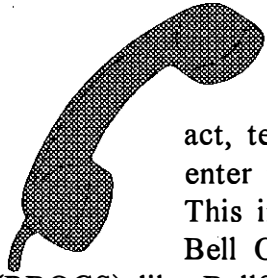
If you allow a cable operator to provide phone service without a new telecommunications franchise, **you cannot collect franchise fees for that phone service under the cable franchise.**

If you have a cable operator who wants to get into the telephone business, the only way you will be able to control



the use of the rights of way for that purpose and collect an appropriate fee for that use is to negotiate a new franchise with your cable operator separate from the cable franchise.

## Local Telephone Companies



Just as cable operators can get into the telephone business under the 1996 act, telephone companies can enter the cable television market. This includes both the Regional Bell Operating Companies (RBOCS) like BellSouth, their smaller competitors such as GTE, and other new local service providers such as AT&T and the other long-distance companies.

All of these companies have the same video-service options available to them. They are:

### 1. "Wireless" Option

If a phone company decides to offer a wireless (microwave) video-service, it does not need a local franchise. This assumes that such a system does not use any public rights of way. This is a technology that has been available and in operation for at least 10 years in some areas and is known by the oxymoron of "wireless cable."

### 2. "Common-Carrier" Option

Under this option, the telephone company builds a cable system, but does not operate a cable service. The system is leased to another company that is the actual video-service provider. Under this option, the telephone company does not need a cable franchise. However, the 1996 act does not make it clear if a city could require a different type of franchise. This situation would be governed by state law. And, presumably in Tennessee, a city could require a telecommunications franchise of the telephone company.

### 3. "Traditional-Cable" Option

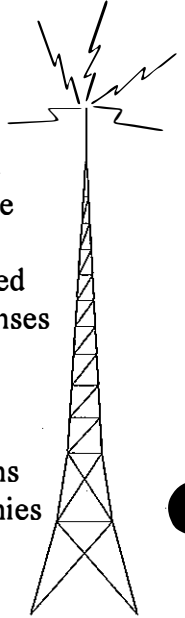
If the phone company chose to operate the system directly, then they could be required to execute a standard cable franchise with all the same provisions your existing cable operator is required to operate under.

### 4. "Open Video System" (OVS) Option

This is a new definition added in the 1996 act. An OVS is a system that the owner provides services, but also leases out a significant portion of the bandwidth to other operators. Such a system requires FCC certification under recently devised FCC rules. Because of the definitions of OVS and the current situation on the ground in most Tennessee cities, we are not likely to see any OVS systems starting up any time in the near future.

## Wireless-System Towers

Last year, the FCC auctioned off a portion of the radio spectrum in the 1900 MHz band for use by PCS providers. This auction, which raised more than \$7 billion, awarded licenses to two companies in each of 51 geographic areas to provide PCS services. Tennessee is covered by four of those 51 areas, which means that there are at least eight companies looking to recover or expand their investment in PCS by building **1,000 to 2,000** wireless towers in Tennessee in the next four to six years. PCS services have the potential to be price-competitive with both traditional wired telephone service and existing cellular service. The problem arises because of the technology. It requires more towers spaced closer together than current cellular service. The towers are usually smaller, yet they are much more numerous.



While there were fears in Washington that the FCC or Congress might totally pre-empt local zoning authority over these wireless towers, the 1996 act establishes that local zoning authority over the construction and placement of wireless telecommunications facilities is retained, subject to some specific conditions.

Those conditions are:

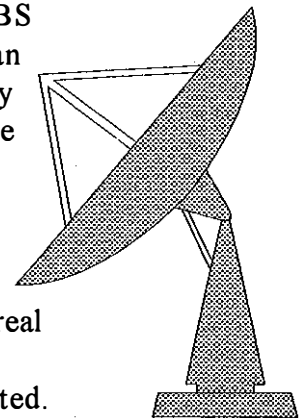
1. **Local zoning may not discriminate among wireless telecommunications providers that compete against one another.** For example, if Cellular One were permitted to build one tower under local zoning a few years ago, the fact that a PCS service is denied the ability to build five towers scattered at the appropriate interval across the city, could be construed as discriminatory.
2. **Local zoning may not have the effect of prohibiting the service.** For example, if a city consisted of all residential zoning that prohibited any structure more than 30 feet and the city was extensive enough that all, or a portion of it, could not be served by a tower outside of the restricted area, then the effect would be to prohibit the service totally or partially within the city. This is not permitted.
3. **Local government must act on a tower-siting request within a reasonable period.** This has been interpreted to mean that the request should be handled in the normal process of the zoning and permitting system. Any unusual or excessive delays could be interpreted as a violation.
4. **Any denial of a siting request must be in writing and based on a written record before the council or other decision-making body.** If a denial is even a possibility, the safest interpretation of this requirement would be to hold a scheduled public hearing with a complete transcript of the proceedings.
5. **Local governments may not deny a facility based on fear of harm to residents from Radio Frequency Emissions (RFE).** Congress has clearly tasked the FCC to be the arbiter of safety and health standards for RFE. The only

possible remedy would be a federal court action challenging the FCC's RFE standards.

### **Direct Broadcast Satellite (DBS) Receiving Dishes**

In the 1996 telecommunications act, Congress required that the FCC devise rules that would ensure that customers of satellite broadcast signals would not be discriminated against by local zoning regulations. The FCC rule, which is now in effect, prohibits any regulation that would prohibit the use of any satellite dish one meter or less in diameter in any residential area, or prohibit any dish two meters or less in diameter in any commercial or industrial area. The only possible exceptions are for historic buildings or districts as designated by the Department of the Interior and clearly demonstrable health and safety reasons.

One additional provision prohibits any local taxation of DBS services, which can mean local sales taxes and any other tax imposed on the service. State sales and other taxes are not prohibited, and local property taxes on the DBS equipment or the real property of the DBS provider are not prohibited.



## Current Legislative Issues



The ability of Tennessee cities and towns to control their rights of way depends on state law. As of now, that law is clear and unambiguous. TCA 65-21-103 clearly

gives local governments the right to control the use of their rights of way, including the right to "exact rentals" for their use in a nondiscriminatory manner. Tennessee cities and counties will face several issues in the upcoming legislative session including this existing right, how it has been historically used with BellSouth and its predecessors, and how it will be used in the future.

In the last session of the Tennessee General Assembly, a bill was introduced by some of the potential competitors of BellSouth in the local telephone business seemed on the surface harmless at first reading. What the bill called for was a "level playing field" for franchise fees, and it provided that all local telecommunications providers would pay no more in franchise fees than any other provider. The catch to this approach is the fact that only two or three cities in Tennessee collect a franchise fee from BellSouth or any other local telephone-service provider. This bill, had it passed, would have pre-empted all the other cities in the state from collecting any franchise fees from anyone in the local telephone business using the public rights of way because the zero sum collected from BellSouth would have become the standard.

BellSouth disagrees that such a measure would be a "level playing field," pointing out that its universal service burden, its classification as a regulated public utility under the state *ad*

*valorem* tax law (assessed at 55 percent, instead of 40 percent), their contributions to the state's Internet backbone and to various local public projects should count as taxes paid.

This discussion will be renewed in the upcoming session of the General Assembly. Tennessee will not be alone in this problem. Every state in the country will be debating these same issues. The result last year in the Colorado Legislature was that local governments lost out completely. The RBOC in that area, US West, and its potential competitors, joined together to exempt themselves from local control and taxation. There is a double threat to be reckoned with here, however. In addition to any revenue loss, the loss of control over the use of municipal rights of way would be a severe setback to sound local planning and development.

### MTAS Support

MTAS can provide cable franchise and "telecommunications" franchise documents. We can also help you through the FCC rules and regulations and new court interpretations of this law, which will appear continuously as this new regulatory environment evolves over the next few years. For assistance, contact Jim Finane in the MTAS Knoxville office at (423) 974-0411, or contact the MTAS management consultant in your area.

## What Tennessee Cities and Towns Should Do

Some of the following suggestions are from a publication titled *The Telecommunications Act of 1996: What it Means to Local Governments*, published by the National League of Cities. A copy of this publication was provided by the Tennessee Municipal League to every mayor and city manager/recorder who attended the TML annual conference in June 1996. This well-written NLC explanation goes into more detail on all of the subjects covered in this MTAS bulletin. Additional copies are available from NLC.

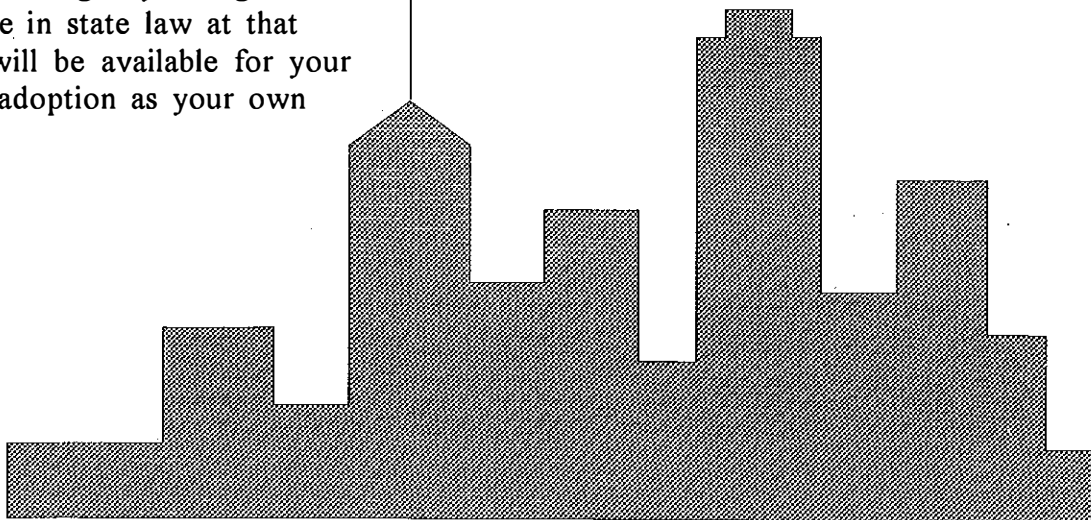
**1. Consider your city as the landlord of the public rights of way and the users of those rights of way as your tenants.**

In many cities in Tennessee, this relationship already exists inside the realm of local government. Municipal electrics in Tennessee are tenants of their city's rights of way today, and many such cities are, as a result, very familiar with right of way management issues. You should remember that you are entitled to fair compensation for the use of your rights of way by all users, but you need to ensure that you carry out that management in a nondiscriminatory manner. At the end of the upcoming legislative session, MTAS will develop a "Model Right of Way Management Ordinance," incorporating any changes which may be made in state law at that time. This model will be available for your customization and adoption as your own ordinance.

**2. Start thinking of the telecommunications world as a group of competing vendors of similar services.** Treat telecommunications as you would any other potentially competitive professional service such as engineering, auditing, banking, issuing debt, or data processing. Keep an open mind about what services are possible and available, because the arrival of new "players" and changes in vendors you thought you understood will be constant.

**3. Use your status as a large user of telecommunications services and right of way landlord to maximize your telecommunications services and minimize your costs.** The larger your city is, the more telecommunications services you use. You need to maximize whatever advantage you may have to receive the best possible deal for your taxpayers.

**4. Stay in close contact with your state legislators and TML during the upcoming 1997 session of the General Assembly.** The issues outlined above will be under active discussion starting in January, and every city in the state has a direct stake in the outcome. Your informed support will be critical if cities are to succeed on this issue.





The Municipal Technical Advisory Service (MTAS) is a statewide agency of The University of Tennessee's Institute for Public Service. MTAS operates in cooperation with the Tennessee Municipal League in providing technical assistance services to officials of Tennessee's incorporated municipalities. Assistance is offered in areas such as accounting, administration, finance, public works, communications, ordinance codification, and wastewater management.

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